

Phuong (Migration) [2019] AATA 4637 (8 October 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Han Kiet Phuong

CASE NUMBER: 1714685

HOME AFFAIRS REFERENCE(S): BCC2015/2042253

MEMBER: David Crawshay

DATE: 8 October 2019

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211(2) of Schedule 2 to the Regulations; and
- cl.820.221 of Schedule 2 to the Regulations.

Statement made on 08 October 2019 at 3:07pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – sponsor as the applicant’s representative – genuine spousal relationship – financial aspects – minimal financial integration – household arrangements – reside jointly at two addresses – social aspects – photographic evidence of the parties’ wedding – commitment to relationship – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant, 35, applied for the visa on 15 July 2015 on the basis of his relationship with his sponsor, Mrs Ngoc Doanh Nhan, 32. Mrs Nhan is also known as "Jessica Nhan".
4. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
5. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.820.211(2) because the applicant did not meet the definition of spouse under s.5F of the Act. The delegate considered that there was insufficient evidence to demonstrate that the applicant was the spouse of the sponsor.
6. The applicant appeared before the Tribunal on 5 September 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
7. The applicant was represented in relation to the review by his sponsor.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

REPRESENTATION

9. As stated above, the applicant was represented in relation to the review by his sponsor.
10. The Tribunal explained to the sponsor at hearing that she had a dual role as the applicant's representative and as a witness, and it considers that she fully appreciated this distinction. At appropriate points during the hearing, the Tribunal also made it clear to the sponsor when it was dealing with her as the applicant's representative and when she was being asked questions as a witness.
11. The Tribunal asked for the sponsor's consent to leave the room while the applicant gave his evidence (as is ordinarily required of witnesses), and this consent was given. When the sponsor returned to the room, the Tribunal gave her an oral summary of the questions that were asked of the applicant as a means of affording her, as the applicant's representative, a measure of procedural fairness.
12. The Tribunal is satisfied that procedural fairness was ensured throughout the hearing.

BACKGROUND

13. Both parties arrived in Australia as recipients of student visas (TU-573). The sponsor arrived in Australia in August 2006 and was granted another two student visas before attaining a skilled sponsored visa (VB-886). She was conferred Australian citizenship in March 2012. The applicant arrived in Australia in November 2008 and lived with his aunt in Springvale South. He was granted another student visa in September 2013.
14. The parties claim to have met at a party in 2009 organised by students at Deakin University. At that time, the applicant's sister was studying accounting and financial planning with the sponsor at Deakin University. The applicant was studying English at MIBT (which the Tribunal understands is now known as "Deakin College"), and MIBT's campus was close to Deakin University. The parties claim to have been sitting on the same table at that party and exchanged conversation.
15. The parties purportedly became friends and ended up seeing each other at parties. They state that at this point they were just friends, and only became boyfriend and girlfriend in around 2012. Around that time, the sponsor was living in Coburg North and the applicant was living firstly with his aunt in Springvale South and then with his sister in Clayton South.
16. The parties claim to have grown closer to each other in 2013 and 2014. In August 2014, the parties signed a lease for a house in Springvale Road, Forest Hill, where they claim to have lived under the same roof but stayed in separate beds due to cultural reasons. The applicant purportedly proposed marriage to the sponsor on Brighton Beach on a night in spring 2014.
17. The parties travelled together to Vietnam in January and February 2015. The purpose of the trip, according to the parties, was to introduce themselves to their future families-in-law and also to consult with a fortune-teller to choose an auspicious date for their marriage.
18. In May 2015, the parties submitted to a traditional marriage ceremony at their house in the morning involving a full roasted pig, betel leaf, tea and eight trays of offerings, before posing for a number of photographs at various places around Melbourne with members of their bridal parties. The parties celebrated a reception at a function centre in Ascot Vale that evening. A month after in June 2015, the parties signed a marriage certificate in Springvale South and in that month, the visa application was lodged.
19. The parties claim to have moved to an address in South Morang in late 2015 which the sponsor had bought. They claim to still live there today. The parties claim to share the residence with the sponsor's mother – an Australian permanent resident – when she is in Australia.
20. The parties made another trip together overseas in late 2017, spending time in Singapore and Vietnam with the sponsor's mother before returning to Australia.

CONSIDERATION OF CLAIMS AND EVIDENCE

21. The issue in the present case is whether the applicant is the spouse of the sponsor under s.5F of the Act.

Whether the parties are in a spouse or de facto relationship

22. Clauses 820.211(2) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.

23. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. For persons to be in a married relationship:
- they must be married to each other under a marriage that is valid for the purposes of the Act;
 - there must be a mutual commitment to a shared life as a married couple to the exclusion of all others;
 - the relationship must be genuine and continuing; and
 - the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d).
24. In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects, the nature of the applicant's and the sponsor's household and their commitment to each other, as set out in r.1.15A(3) (which is extracted in the attachment to this decision). Each of the specific matters contained in r.1.15A(3) is effectively a question which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

25. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a). The Tribunal has sighted a certificate of marriage registered on 2 July 2015 for a marriage which took place on 20 June 2015 (refer folio 32). This certificate stated that the marriage was solemnised in accordance with the *Marriage Act 1961*.

Are the other requirements for a spouse relationship met?

26. The Tribunal is aware that the parties submitted very little evidence to the Department which attested to their relationship, comprising only a marriage certificate, a residential tenancy agreement and a Form 888 statutory declaration. Since the decision of the delegate, the Tribunal has been in receipt of a substantial number of documents, including bank account statements, correspondence and, above all, photographs of the parties with each other and with friends. This evidence, along with the parties' oral testimony given at hearing, has been considered below.

27. *Financial aspects of the relationship*

28. The Tribunal has considered any joint ownership of real estate or other assets, any joint liabilities, the extent of pooling of financial resources, any legal obligations owed to the other party, and any sharing of day-to-day household expenses in assessing the financial aspects of the relationship.
29. The parties gave consistent evidence that they live in a house which is owned by the sponsor, her name being the only one that appears on the title and the mortgage. When asked why the applicant's name could not be put on the title and mortgage, both parties said that it would have affected the loan amount given his income and his residency status. The parties stated at hearing that the applicant helps contribute to the home loan repayments, and statements from his Commonwealth Bank transaction account show weekly transfers of between \$200 and \$500 being made for "home" payments. On the basis of this evidence,

the Tribunal accepts that, while there is no formal joint ownership of real estate, the parties jointly contribute to it. The Tribunal gives this evidence some weight in its consideration of the financial aspects of the relationship.

30. Both parties stated that they do not bear any joint debts or liabilities, nor does one of them owe any legal obligations in respect of the other, including by way of will or superannuation nomination. The Tribunal therefore gives this little weight in its overall consideration.
31. In relation to the extent of pooling of financial resources, the Tribunal points to its finding above regarding joint contributions to home loan repayments and accepts that this demonstrates a type of pooling of resources. Apart from this evidence, however, the parties submitted little other evidence that they have integrated their finances. A number of utility bills for electricity, gas, water and internet have been provided to the Tribunal but these are all in the name of one of the parties and not both. Additionally, the parties have maintained separate bank accounts throughout the period of the claimed relationship. When questioned by the Tribunal on this point, the applicant said that the reason was that the parties both have incomes, and do not want to restrict one another's spending. The sponsor said that she wants to maintain control of the expenses (including in relation to the mortgage). Curiously, she also claimed that she did not want the applicant to know her salary, because he might look down on her. While the Tribunal acknowledges that couples may legitimately choose to keep their finances separate, it has some concerns about the parties' motivations for doing so in this case. It gives this evidence little weight in its assessment of the financial aspects of the relationship.
32. The parties gave consistent answers to the question of who pays for what household expenses. The applicant contributes a weekly amount for mortgage repayments as well as food, and the sponsor pays the balance. In addition, the applicant has sole responsibility for paying for the internet connection. The Tribunal gives this evidence moderate weight in its consideration of the financial aspects of the relationship.

33. *Nature of the household*

34. The Tribunal has considered any joint responsibility for the care and support of children, the parties' living arrangements and any sharing of housework in assessing the nature of the household.
35. The parties gave no evidence of having responsibility for the care and support of any children and this aspect was not considered by the Tribunal as a result.
36. In respect of the parties living arrangements, the parties claim to have resided jointly at two addresses – one in Forest Hill and the other in South Morang. A number of pieces of correspondence were submitted in support of the two claimed joint residences, comprising bank account statements and bills for electricity, gas, water services and internet connection for both addresses. The parties also provided letters from the Commonwealth Bank addressed to both parties at the South Morang address in relation to two loan application approvals. The Tribunal notes that, with the exception of the letters from the bank, all correspondence is directed to one or other party at those addresses but not both.
37. The parties previously submitted to the Department a lease agreement for the Forest Hill address dated 29 July 2014 which the Tribunal accepts as genuine. This agreement, combined with photographs from inside and outside that house and consistent testimony of the parties about the particulars of the house, leads the Tribunal to conclude that the parties most likely lived there as claimed. The parties gave evidence that they maintained separate sleeping arrangements in the Forest Hill address until their wedding – the reason for this

being the traditional views of the parties (especially the sponsor) regarding living together before marriage. The Tribunal accepts this explanation.

38. As to the second claimed joint residence in South Morang, in addition to the correspondence mentioned above (which is addressed almost primarily to one party or the other), the Tribunal has had the benefit of questioning the parties on the finer details of the house and their living arrangements, and they gave consistent evidence. The parties also submitted a number of photographs from within the house. The Tribunal is satisfied that this evidence demonstrates the parties lived and continue to live there.
39. An issue arose for the Tribunal in relation to several pieces of correspondence addressed to the applicant that suggested he was living at his original address in Springvale South with his aunt as late as July 2015 when he was lodging his visa application (and when he claimed to live in Forest Hill). The Tribunal put this information to the applicant and he replied that he was not good at keeping track of documents. He preferred to keep a separate “address for correspondence” during his time renting at Forest Hill and would pick up his mail when he visited his aunt, which he said was regularly. The sponsor confirmed this in her testimony. The applicant told the Tribunal that since the parties have moved into the South Morang address, he has redirected his mail there. The Tribunal accepts the applicant’s explanation.
40. The totality of this evidence leads the Tribunal to accept that the parties lived as claimed at the time of application and at the time of this decision – that is, at the Forest Hill and South Morang addresses. It gives this aspect significant weight in its overall consideration of whether the parties lived together.
41. Turning to the sharing of housework, both parties gave consistent evidence about who has responsibility for what tasks. The applicant would clean the bathrooms, take out the bins on Thursday night and mow the lawn. The sponsor would clean the kitchen and vacuum the house. Both would share in the cooking duties, although the sponsor would do most of the meals. Based on this consistency of testimony, the Tribunal is satisfied as to the sharing of housework and gives this aspect moderate weight.

42. *Social aspects of the relationship*

43. The Tribunal has considered whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake joint social activities in assessing the social aspects of the relationship.
44. The Tribunal has received over 200 photographs of the parties, although it notes that a small number of these are copies of ones already submitted. The photographs show the parties with one another or in the company of others. Some of the photographs show the parties out to dinner with friends or by themselves, and others show them attending weddings of their friends and at other celebrations. It is clear from these photographs that the parties socialise widely, and the Tribunal gives them substantial weight in finding that the parties plan and undertake joint social activities.
45. The majority of the photographs are of the parties on their wedding day. Some show the traditional ceremony which occurred inside and outside the Forest Hill address in the morning. There are also official shots taken at different landmarks throughout Melbourne. Most, however, show the reception which took place in Ascot Vale that evening and the parties posing for photographs with many different groups of friends and family. The parties claim that around 80 to 100 people were in attendance, including those members of each family who were in Australia at that time, and friends from work, university and other facets of their life. The event appeared to be a substantial affair, with changes of clothes involved

as well as pyrotechnics. Based on the price-per-head provided by the quote dated 26 April 2015, the cost of the event was not insubstantial either.

46. The Tribunal finds that the photographic evidence – including, importantly, the parties' wedding day – overwhelmingly demonstrates that the parties represent themselves to other people as being married to each other and this is given significant weight.
47. A Form 888 statutory declaration was submitted to the Department from a Mr Anthony Tran, a friend of the applicant. In the declaration, Mr Tran stated that he has known the applicant since around 2009 and the sponsor since around 2013. Mr Tran states that the relationship is genuine because the parties live together and they "seem happy together". With respect to Mr Tran, who took time to complete his declaration, the Tribunal considers that he offers only a limited insight into the parties' relationship and his declaration is given little weight.
48. Although the applicant has submitted no other evidence relating to the opinions of friends and acquaintances about their relationship, the sheer number of photographs submitted suggests to the Tribunal that the relationship is recognised by a wide range of the parties' family, friends and others. Given the nature of the photographs and the fact that so many are taken in the presence of others in social situations, the Tribunal accepts that these other people recognise and accepts the parties as being in a genuine and continuing relationship. It gives this evidence substantial weight.

49. *Nature of parties' commitment to each other*

50. The Tribunal has considered the duration of the parties' relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other and whether they see the relationship as long-term in assessing the nature of the parties' commitment to each other.
51. The parties claim to have met in 2009, and to have entered into a boyfriend/girlfriend relationship in 2012, or around seven years ago. Not many photographs were tendered to the Tribunal from around that time, although it has seen a handful which shows the parties together in social situations. It is satisfied, based on these photographs and on the overall consistency of their testimony regarding these events (which are, after all, at least seven years old) that the parties met as claimed in 2009 and formed a relationship around 2012. It further accepts that they lived under the one roof (either separately owing to cultural traditions or together) from August 2014, or for over five years. It accepts that the parties were engaged to marry at some point in late-2014, and that they began making preparations for their wedding at this point. The Tribunal notes the duration of the parties' relationship and the length of time they have lived together and gives these factors significant weight in its overall consideration of the nature of the parties' commitment to each other.
52. Within this time, the parties have been on holidays in Australia together (going to the vineyards of South Australia, the Great Ocean Road, country Victoria and the Gold Coast) as well as overseas (to Vietnam and Singapore). As stated above, they engage in joint social activities with a range of friends. The many photographs of the parties show them at ease with each other, and they appear to function as a devoted couple.
53. The parties gave evidence at hearing that they have offered each other a great deal of emotional support throughout their relationship. For the sponsor, this support shone through when she was suffering from a short-lived medical condition which resulted in hair loss. She said that the applicant had comforted her by telling her that he will still love her in spite of whatever happens. For the applicant, he told the Tribunal that the sponsor had stuck with him in spite of some "tough times". He considers the sponsor to be a caring woman by the

way that she looks after her ill mother, often accompanying her for the journey back to Vietnam – a round trip that takes two days.

54. When asked what effect a visa refusal would have, both parties stated their disappointment. They told the Tribunal that they had discussed this possibility and they would try to make things work. The applicant spoke about the possibility of the sponsor returning to Vietnam (although he said that there may be problems with this given that the parties reside in different parts of the country) and the sponsor said that she would reapply. This evidence shows that the parties are not willing to give up on their relationship, no matter the obstacles, and this further demonstrates to the Tribunal their commitment.
55. The evidence tendered to the Tribunal, including oral testimony from the parties that the Tribunal found genuine, clearly demonstrates that the parties offer each other companionship and emotional support that is commensurate with a married couple.
56. The parties outlined their future plans to the Tribunal. They are presently worried about large transmission lines that run close to their house in South Morang. The sponsor has heard of the adverse health effects that come with living close to these, and she fears for the health of a baby. With that in mind, both parties gave evidence that they wish to sell-up and move to a house elsewhere so that they can raise a family. In support of this claim, the parties tendered letters from the Commonwealth Bank detailing how much finance they can expect to access for the purchase of a property. The sum appears to be more than the market value of their current residence, suggesting that they have the ability to move.
57. The applicant said that the parties had spoken about what would happen if they were to start a family – the sponsor would take time off from her work in accounts at a plastics company to stay home and care for the child. The sponsor confirmed this and stated that she was aware of her employer's maternity leave policy. The Tribunal is satisfied that the parties have turned their minds to their future plans as a couple and gives this substantial weight in its consideration of whether they view their relationship as long-term.

CONCLUSION

58. As stated above, the Tribunal harbours some concerns regarding the level of financial integration of the parties. While they have achieved a measure of pooling of resources through their joint contribution to mortgage repayments, they have yet to integrate their finances through a joint bank account.
59. Be that as it may, the deficiencies experienced here are far outweighed by a preponderance of compelling evidence as to the overall nature of the parties' household, the social aspects of their relationship (including recognition of their marriage by family and friends), and the nature of their commitment to each other and to their relationship.
60. The effect of this evidence is that the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision. The parties have a mutual commitment to a shared life as a married couple to the exclusion of all others, their relationship is genuine and continuing, and they live together.
61. Therefore the applicant meets cl.820.211(2) and cl.820.221.
62. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

63. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl.820.211(2) of Schedule 2 to the Regulations; and
 - cl.820.221 of Schedule 2 to the Regulations.

David Crawshay
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).